No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

OPENING BRIEF OF TWOHY BROTHERS COMPANY AS CROSS-APPELLANT

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

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Twohy Brothers Company (hereinafter called "plaintiff") is appealing from a final judgment awarding to it what it deems an inadequate recovery in an action against Northern Pacific Railway Company (hereinafter called "defendant"). The litigation arises out of a railroad construction contract.

Plaintiff is a corporation organized under the laws of Oregon (R. 6). Defendant is a corporation organized under the laws of Wisconsin and more than $3,000.00, exclusive of interest and costs is involved, (R. 6). Jurisdiction in the federal court is based on diversity of citizenship (Judicial Code, Sec. 24, U.S. C.A. Title 28, Sec. 41). The case is not of a nature permitting appeal directly to the Supreme Court (Judicial Code, Sec. 128, U.S.C.A. Title 28, Sec. 225).

Testimony was taken before an auditor. Thereafter the case was tried to the court upon the record made before the auditor, a jury being waived in writing (R. 276).

STATEMENT

On September 18, 1925, defendant sent to various contractors, including plaintiff, an invitation to bid on construction of a logging railroad from Orofino to Headquarters, both points in the State of Idaho. Orofino is a station on a Northern Pacific branch line. Headquarters is a point in the mountains 41 miles distant from Orofino. The letter inviting bids stated the purpose of the road to be to penetrate the timber holdings of the Clearwater Timber Company; that the timber company was planning a large mill at Lewiston, which would be finished early in 1927, and that speed in construction was essential—rails to be laid so as to move logs by June 1, 1927, and the job finished by September 1, 1927 (R. 280). It further advised that defendant was forwarding a profile and detailed description of the proposed line made by Engineer Chamberlin; also blank forms for bids on a unit basis. This data, duly received by plaintiff, exhibited a survey up the canyon of Orofino Creek, with all details of a final survey, showing the number and location of changes in the creek channel, the number of bridges to be constructed, amount of material to be moved, etc. (R. 286). Contractor was requested to bid on conducting all commercial hauling over the road while under construction and until the completed road was accepted by the operating department of defendant (R. 306).

Plaintiff's bid was accepted October 15, 1925 (R. 298), but the contract was not executed until November 18, 1925 (A. 277). The contract does not indicate the course of the road nor character or amount of work (R. 52), authough it requires the contractor to investigate the proposed line before bidding (R. 71). Essential information appears only on the data submitted with the invitation to bid.

The aggregate bid prices were computed by defendant upon the quantities and work shown on the profile submitted with the invitation to bid, called the Chamberlin profile (R. 289). Before executing the formal contract, construction was begun on the Chamberlin profile by plaintiff and defendant's engineers, under instructions from defendant (R. 289, 298). After a few months defendant began making changes in the work as outlined on the Chamberlin profile, changes that progressively increased the yardage to be moved, eliminated bridges, and greatly increased the number and difficulty of changes in the channel of Orofino Creek (R. 301-303). This slowed up progress of the work and threw a considerable portion of the grading into the second winter (R. 303-304). The contractor's plans, based on data furnished with the invitation to bid, called for completion of grading before the second winter, and the work would have been performed accordingly but for the changes above alluded to (R. 303). By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material (R. 303-304). This was in excess of the total estimate on which plaintiff bid.

The canyon of Orofino Creek is very rugged and steep (R. 302). In it was the most difficult work. Entrance to it with heavy machinery was controlled by the lower or first section of the work out of Orofino (R. 300). Plaintiff sublet the work, the subcontracts being approved by defendant (R. 303). The first 15 miles out of Orofino was let to one subcontractor. Changes on this sector gradually increased the amount of work until it had almost doubled and its completion was delayed many months (R. 300-301). This held up work in the canyon of Orofino Creek until it had to be performed under conditions of almost indescribable difficulty (R. 304-305). Completion of the entire job was delayed from September 1, 1927, to the end of the

year (R. 305, 311). Whereas the amount of yardage represented on the Chamberlin profile was 1,078,000 cubic yards (R. 288), the final estimate showed 2,057,-575 cubic yards (R. 289).

Prior to June, 1927, the Clearwater Timber Company cut many million feet of logs and banked them along the railroad. To avoid serious damage these logs had to be moved to the millsite before the following winter. Some of them were moved by plaintiff under the provisions of the contract requiring plaintiff to conduct all commercial business (R. 309). The contract price was $1.00 per car mile (R. 307-308) and the job of moving all the logs banked would be quite profitable to plaintiff and correspondingly expensive to defendant. In the latter part of June, 1927, defendant, through its chief engineer, advised plaintiff that defendant was going to take the log haul—conduct it with defendant's own trains and crews. When plaintiff protested defendant served a notice upon plaintiff to stop work on that portion of the road ready to move logs (Orofino to Jaype), although that portion of the road was not finished (R. 305). Defendant completed the finishing work on the portion indicated (R. 311) and conducted the log haul (R. 309). A like notice was served and like action taken as to an additional portion of the unfinished road when ready for log haul (R. 306).

In each notice to stop work there was specific order to continue the contract as to the remainder of the road (R. 306). The first of these notices was served in July, 1927, prior to the contract finishing date (September 1, 1927). The second notice was served in October, 1927, after the contract finishing date, and directed work to continue under the contract.

The construction contract required plaintiff to haul to the various bridge sites the materials for construct-

ing bridges, culverts, etc (R. 324). These consisted of corrugated pipe, metal fastenings, timbers for stringers, decking, etc. Bid forms designated certain of the hauling as "team haul" and called for separate prices for the various materials. When bids were under consideration the words "team haul" were stricken out by defendant and "hauling" inserted in lieu thereof, with consent of plaintiff. The contract as executed carried out the change and named prices for "hauling" the several materials. Defendant refused to pay these stipulated prices for hauling bridge materials. Plaintiff was paid only the commercial haul prices for this work (R. 325).

The contract provides that when it shall have been performed the chief engineer shall so certify and give a final estimate and statement of the balance unpaid "and the company within thirty days thereafter will pay the full balance" (R. 71).

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor" (R. 70).

After the peacemeal taking of the road while under construction, noted above, defendant on October 25, 1927, took the entire road from plaintiff (R. 167). The completed road was turned over to defendant's operating department December 31, 1927 (R. 168).

The complaint contains in one statement four causes of action:

(1) For extra cost to the contractor caused by the conduct of defendant in changing and increasing the character and amount of work from that submitted in the invitation to bid (R. 5-17).

(2) For the value of the commercial or log haul wrongfully taken from plaintiff by defendant (R. 17-21).

(3) For the unpaid balance due for hauling bridge materials at the prices stipulated in the contract (R. 21-23).

(4) For a balance due on book accounting (R. 23).

The last item (4) was disposed of by stipulation and is not involved in the appeal of either party (R. 171).

Plaintiff relies upon Assignments of Error I (R. 373), II (R. 377), III (R. 383) and IV (R. 384).

CONTENTIONS OF PLAINTIFF

(1) The court ruled that evidence of the data submitted with the invitation to bid would be received only to show the general location of the road but would be rejected as a representation of the amount or character of work (R. 291). It is the position of plaintiff that this evidence was admissible without restriction; that the contract is ambiguous in that it fails to indicate what course the proposed road would pursue —up what mountain canyon it would go—the size of the job or character of work, all of which was essential to a bidder; that the representations of these matters submitted with the invitation to bid became a part of the contract, were submited for that purpose and are essential to an intelligent consideration of the contract.

(2) With respect of the commercial or log haul this appeal presents a question of pleading. The court found plaintiff was entitled to the contract price for the log haul, less the fair cost of conducting it, but thought the issue of the right to these profits beyond the stipulated finishing date (September 1, 1927), was

not presented by the pleadings (R. 321). As we read the court's opinion he thought the claim of extension of time to complete the contract must be pleaded in the reply (R. 339). It is plaintiff's position that the claim of extension of time is properly looked for in the complaint—that a plaintiff claiming beyond the stipulated finishing date must state in the complaint the basis for such claim, and that such issue is presented in the complaint in this cause.

Plaintiff is of the opinion that the trial court intended to and did put the record in such condition that this court can make the proper award on this cause of action. The trial court found that plaintiff was directed to continue the contract after the finishing date, and found the amount of recovery that should be awarded if plaintiff was entitled to the log haul after September 1, 1927 (Finding XV, R. 164; Finding XVIII, R. 169).

(3) In awarding recovery on the cause of action for an unpaid portion of the contract price for hauling bridge materials the court refused to allow interest from the due date fixed by contract (R. 324). The action was for money due in a stipulated amount at a fixed time. The defendant raised an unwarranted controversy over construction of the contract, and denial of interest permits defendant to profit by its own wrong.

It is the position of plaintiff that it was entitled to interest as of right from the due date; that denial of interest for the use of this money denies just compensation which can not be defeated by an unwarranted controversy over construction of the contract.

(4) In awarding plaintiff what it believes an insufficient recovery on the commercial or log haul, the court denied interest on the recovery (R. ~~323~~ 322). It is the position of plaintiff that where a contract provides

that defendant shall adjust all matters and pay all moneys due at a definite time after performance, and where the rate of pay for hauling logs and the amount of logs hauled are definitely known to defendant, the claim for refusing permission to perform is liquidated within the intendment of interest laws and will draw interest from the due date; that this is not changed by the existence of an offset for the cost of the haul—the latter item will reduce the amount of principal but not defeat interest.

(Complete Assignment of Error I is in Appendix, p. 43).

ASSIGNMENT OF ERROR No. I (R. 373)
(Abridged)

Error is assigned in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where a railroad construction contract specifies a unit price and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material as to difficulties and size of job. Defendant, desiring to construct a 41-mile railroad through a rugged mountain range, on September 18, 1925, mailed an invitation to bid to plaintiff at Seattle, Washington, accompanied by profiles showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. Profiles contained all information of a final location: Grade, curvature, amount and classes of material to be moved, and a detailed description of the line. A time limit was named for completion. Construction was begun a month before the formal contract (drawn by defendant) was signed.

The contract names the termini, but does not designate the route of the proposed line and is on a unit basis. Plaintiff in bidding relied upon the said profile and data. Defendant in computing and comparing the several bids used the same data and furnished plaintiff a large number of blue prints of said profile for use in letting subcontracts. Defendant approved the subcontracts. Defendant's field engineer began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile. As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards were moved. The letter of invitation to bid above mentioned, the profile above mentioned, and the description of the proposed railroad line were all objected to as being written before the formal contract. In putting in its defense, defendant covered the evidence objected to. The court limited said evidence to establishing the general course of the projected road to be through the canyon of Orofino Creek and rejected it for all other purposes. Exceptions were reserved and findings requested.

ARGUMENT

This assignment presents an exception material to both the first and second assignments. It weighs importantly in consideration of the claimed right to recover for the commercial or log haul after September 1, 1927, the finishing date named in the contract. The rejection, as representations of the amount and character of work, of the data upon which bids were sub-

mitted, caused the court to deny any recovery on the claim for added cost of construction caused by departures from those representations.

The record is clear that if the job had been in size and character approximately that set forth in the representations upon which plaintiff bid there would have been no heavy construction work in the second winter.

As it developed, the heavy work in the fall of 1926 and the succeeding winter broke the financial back of the contractor. True, persistent under-estimates of monthly work (R. 229) and refusal of the chief engineer to pass on claims as presented (R. 242) added much to plaintiff's hardships. Now, however, we are discussing only the admissibility of evidence of the job upon which plaintiff bid. The work was divided among subcontractors approved by defendant with a view to having all work finished by a stipulated time (R. 303). The first 15 miles out of Orofino, sublet to one subcontractor, controlled entrance to Orofino canyon and extended some distance into that canyon (R. 300). So many changes in the work, as represented at bidding, were made in this first 15 miles, so much increase in yardage developed there, that the entire plan was disrupted and work delayed.

After rejecting the representations on which plaintiff was invited to bid, the court held that the contract, being on a unit basis, or so much per yard of rock removed, or foot of bridge timber placed, was to build a railroad from Orofino to Headquarters, regardless of the amount of work; that changes were immaterial because there was nothing to change from; that because the contract was to build a railroad between termini plaintiff can not complain that the amount of work threw an important part of performance into the second winter under greater hardship and loss to the con-

tractor. True, the court admitted this evidence to determine the general course (the canyon to be penetrated) of the road; but the very profile gave the exact location. It didn't show the general but did show the exact course with grade and curvature and amount of material to be moved (R. 288-289).

We believe the foregoing is a fair statement of the court's reasoning and conclusion. It throws into sharp relief the importance of the rejected evidence.

The contract is too ambiguous for such treatment of evidence. It does not specify the route the road is to follow (R. 52). It does provide that the contractor shall make his own investigation of terrain, classes of material, etc. (R. 71) before bidding, something the contractor could not do without knowing the approximate location of the line. The contract does provide that preliminary estimates, classifications, etc., if shown on the profile, are approximate only, the company reserving the right to increase or decrease them (R. 75) ; yet the only preliminary estimates were those on the Chamberlin profile furnished with the invitation to bid, and that was the only profile. The contract reserves in defendant the right to change the line and grade of the railroad, or the amount of work embraced, or the bridges, leaving to the chief engineer adjustment of compensation (R. 72). Without reference to the profile upon which bids were invited, there is no line, or grade, or bridges, or amount of work—there is nothing to change from. Clearly, defendant, who drew the contract (R.277), knew plaintiff had bid upon the work represented on the Chamberlin profile (R. 285). Just as clearly, plaintiff based its bid, its ability to undertake the job, upon that profile (R. 289). That profile was the information used by defendant in determining which bid seemed to be best—the price varied between bidders, and final results were deter-

mined by computing the bid on the amount of each classification indicated by that profile (R. 289). Construction on the ground began on that profile, both by the defendant's field engineers and plaintiff's subcontractors (R. 289). The size of the job throughout was estimated by that profile and the work divided among subcontractors according to amount and difficulties represented on that profile (R. 289). The time limit was such that careful division of work was of great importance.

We believe there can not be a shadow of doubt that both parties intended the bid to be made and accepted on the data furnished with the invitation—that the data so furnished represented the size and difficulties of the job.

> *Faber v. City of New York* (1918), 222 N.Y. 255, 118 N.E. 609, 610.

If not so intended, why was such information supplied—information that embraced all requirements of a final location? If bidders were expected to make a blind bid for an unknown yardage, with an unknown number of bridges or channel changes, why was any representation made as to these matters?

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d) 1, 2 (9th CCA).

We attach importance to the fact that work was begun on the representations contained in this rejected evidence before the contract was executed. Defendant's desire for speed looms large. It demanded that work begin immediately the bid was accepted (R. 280). Plaintiff complied, and worked for a month under defendant's direction on the Chamberlin profile (R. 298) before formal execution of the contract. The effort of the court should be to determine the intent of

the parties to a contract from the terms of the contract, but where the contract is ambiguous, as this one clearly is, as to the amount and character of work, and the conduct of the parties explains the ambiguity and indicates the understanding, evidence of such conduct is admissible.

Baker County v. Huntington (1905), 46 Or. 275, 278; 79 Pac. 187, 189.
Corvallis & Alsea River R. Co. v. Portland E. & E. Ry. Co. (1917), 84 Or. 524, 534, 536; 163 Pac. 1173, 1177.
Bernitt v. City of Marshfield (1918), 89 Or. 556, 561; 174 Pac. 1153, 1154-1155.
Jaloff v. United Auto Indemnity Exchange (1927), 120 Or. 381, 387; 250 Pac. 717, 720.
Miller v. Robertson (1924), 266 U.S. 243; 69 L. ed. 265, 272.
New York Alaska Gold Dredging Co. v. Walbridge (1935), 76 F. (2d) 655, 662 (9th CCA).
Salt Lake City v. Smith (1900), 104 Fed. 457, 462 (8th CCA).
National Contracting Co. v. Hudson River Water Power Co. (1908), 192 N.Y. 209; 84 N.E. 965, 967.

Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co. (1917), 239 Fed. 603, 607 (7th CCA).
CCA).
(Top page 607).

"Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding, the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, content and extrinsic circumstances, including the prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract."

The contract specified the *manner* of performing and the *price* per unit to be paid for the work upon which plaintiff bid. The work for which plaintiff offered a bid price was that on the profile submitted with the invitation. By that profile changes should be measured.

Spaulding v. Coeur d'Alene Ry. & Nav. Co. (1897), 5 Idaho 528; 51 Pac. 408, 409, 411.
Tribble v. Yakima Valley Transportation Co. (1918), 100 Wash. 589; 171 Pac. 544, 545, 546.
Hayden v. Astoria (1915), 74 Or. 525, 527; 145 Pac. 1072, 1074.
Hayden v. City of Astoria (1917), 84 Or. 205, 212, 164 Pac. 729, 732.

The right to change the plans or amount of work is limited to incidental changes. When the change is material it constitutes a breach of contract.

Montrose Contracting Co. v. County of Westchester (1936), 80 F. (2d) 841, 843 (2nd CCA).
Wood v. City of Fort Wayne (1886), 119 U.S. 312, 321; 30 L. ed. 416, 419.
Hayden v. Astoria (1915), 74 Or. 525, 527; 145 Pac. 1072, 1074.
Salt Lake City v. Smith (1900), 104 Fed. 457, 465 (8th CCA).
Wolff v. McGavock (1871), 29 Wis. 290, 295.

The decision of this court in

Rajotte-Winters, Inc. v. Whitney Co. (1924), 2 F. (2d) 801.

is not in point, is easily distinguishable on the facts, and deals with an entirely different question of law. The attempt there was to prove a secret or side understanding with defendant's engineer that the work could be done in a different *manner* than that expressly stipulated in the formal contract *(2 F. (2d)*

middle second column *p. 802)*, which was complete and clear. Referring to the formal contract, this court said:

> "There was no subject on which it did not purport to speak."

In the case at bar the contract is ambiguous as to the amount, character and location of work. Compliance with its terms would be impossible without reference to the preliminary data upon which bids were invited. That the case is so distinguishable is accentuated by this court's approval in the *Rajotte-Winters* case of *Salt Lake City v. Smith* (1900), 104 Fed. 457, in which such evidence as that here rejected by the trial court was held material and competent in determining the intentions of the parties.

With this evidence in as representations the case should be governed by the principles enunciated by this court in

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d), 1, 2 (9th CCA).

In a decision from the Third Circuit many decisions of the Supreme Court are reviewed and the right of the contractor to rely upon representations upon which bids are invited is upheld. Requirements for inspection can not relieve from the representations.

> *Passaic Valley Sewerage Commissioners v. Holbrook, Cabot & Rollins Corp.* (1925), 6 F. (2d) 721, 724 (3rd CCA) (certiorari denied 269 U.S. 582; 70 L. ed. 423).

(2) Defendant waived any objections to this testimony. After objecting to the letter of defendant's chief engineer, with the accompanying profile, etc., when offered by plaintiff, the defendant in its own direct

case not only explained its version of the invitation to bid and accompanying data, but also added thereto supplementary data sent to bidders before bids were submitted (R. 285).

The Oregon court is firmly committed to the proposition that if defendant in presenting its case enters upon the subject covered by the testimony objected to when offered by plaintiff, the objection is waived and the court will consider all of the testimony.

Kitchin v. Oregon Nursery Co. (1913), 65 Or. 20, 23; 130 Pac. 408, 409.
Cole v. Johnson (1922), 103 Or. 319, 334; 205 Pac. 282, 287.
Warner v. Ellison and White (1929), 129 Or. 197, 202; 276 Pac. 1108, 1110.

Defendant argued to the trial court that this rule of evidence so firmly established in the practice in Oregon should not be applied because the auditor had no authority to pass upon objections. We submit that reference to an auditor to report the issues and facts to the court does not change the rules of evidence. We know of no holding that a reference prescribes different rules of evidence than would obtain in open court. Whether the evidence is offered before the auditor or in open court it was offered at the peril of waiving the objection to like evidence offered by plaintiff. Defendant certainly could not speculate upon the court's ruling, then claim that it was relieved from the rules of evidence if the ruling was found to be adverse. If defendant did not desire to be charged with the waiver, it could have withheld its offer of evidence until time to try the case, and then could have offered the evidence. Instead, it stipulated for a trial to the court without a jury upon the evidence offered before the auditor. We submit that includes waiver, and all legal consequences of the evidence offered.

As to this Assignment of Error, it seems to plaintiff that a most important consideration to any contractor invited to bid upon a job is the size and difficulties of the job. A very difficult job, small in size, could well be financed, but a job of greater proportions and like difficulty might be beyond the ability of a contractor. We can conceive of no reason why a railroad company inviting bids would submit a representation not only of the exact location of the proposed line, but also of the estimated amount of yardage, number of bridges, number of channel changes, etc., except to advise the contractor of the job he was asked to bid upon, and with the expectation that the contractor would bid upon the data so submitted. When we find that the railroad company furnished no other profile of the work, nothing of the nature was attached to the contract, and work was started upon the profile submitted with the invitation to bid, we think the conclusion is inescapable that the information accompanying the invitation to bid not only was a representation but also was a part of the contract itself. Under well established principles of law, increasing the size of a job almost 100 per cent, changing bridges to embankments, cutting streams through mountain points, and laying railroad bed in the old channel, all of which was not indicated when bids were invited, constitute a breach of contract that justifies additional compensation.

(Complete Assignment of Error II is in the Appendix, p. 46.)

ASSIGNMENT OF ERROR No. II (R. 377) (Abridged)

Error is assigned in ruling that extension of time to complete the construction contract beyond the named finishing date was not in issue, and limiting plaintiff's

recovery for log haul to September 1, 1927. Plaintiff contends its complaint pleads (1) a waiver of the time limit, and (2) extension of time for completion. Defendant invited plaintiff to bid on railroad construction from Orofino to Headquarters, Idaho. The profile upon which plaintiff bid showed a line up the canyon of Orofino Creek with 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. Rail was to be laid by June 1, 1927, to move logs for the Clearwater Timber Company, with September 1, 1927, the finishing date. Subcontracts were submitted to and approved by defendant's chief engineer, providing for completion of grading at various dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line. The canyon of Orofino Creek is very rough, and entrance controlled by the first 15 miles out of Orofino. Profile indicated 352,425 cubic yards of material in this first sector; final estimate was 635,842 cubic yards. The increase developed gradually. June 30, 1926, 355,000 cubic yards had been moved on the first sector. The overrun delayed other work. Many changes from profile representation were made by the engineer, including 22 new changes in the creek channel, 21 bridges eliminated and embankment substituted, work shifted from one side of the creek to the other, heavy rock work required where team work indicated, resulting in much difficult work and a yardage increase from 1,078,000 cubic yards shown on profile to 2,057,575 cubic yards. Plaintiff had a feasible plan (approved by defendant) to complete and would have completed the work on time. In July, 1927, defendant stopped work where rails were laid but directed plaintiff to complete the contract on other portions. Like action was taken on an additional sector

October 7, 1927, after the contract completion date. The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department. Defendant took the portions of the road on which rails were laid in order to get heavy log traffic and deprive plaintiff thereof. The entire road was taken October 25, 1927. Portions thus taken piecemeal were completed and logs handled by defendant's construction department. Road was turned to defendant's operating department December 31, 1927. Appropriate and timely requests were made (and refused) for special findings that time for completion was extended. The court found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927. (R. 321; Finding XVIII.)

ARGUMENT

This assignment presents a single question: Do plaintiff's pleadings claim an extension of time to perform the contract involved either (1) by pleading waiver of time limit, or (2) by affirmatively pleading the extension?

We think a brief reference to the complaint will indicate error of the trial court. We submit the complaint is the pleading in which the issue of extension of time should appear in the first instance. It is not a matter of defense. Plaintiff, suing for recovery beyond the date of final completion fixed in the contract, should lay the basis therefor in the complaint, and if there pleaded the averments need not be repeated in subsequent pleadings.

The complaint (R. 5-24) contains apt averments:

Paragraph VI (R. 8) avers the furnishing by defendant of profile representing the amount and classification of yardage; that plaintiff based its bid thereon; that the yardage defendant required plaintiff to move was just under 100 per cent in excess of the representation; and that the hard rock classification was increased very materially and the common earth decreased materially.

Paragraph VII-VIII (R. 10-12) avers a change in bridge plans while work was in progress; a direction to build bridges from rail end, and a delay in that work by the heavy overrun of yardage in the lower portion of the road, compelling bridge construction in the winter.

Paragraph IX (R. 13) avers that the profiles on which plaintiff bid called for 25 changes in the channel of Orofino Creek involving the excavation of a comparatively small amount of material, the channel changes being light and shallow; that during progress of the work defendant added 38 new channel changes in narrow steep parts of the canyon, increasing the channel excavation requirements over 223 per cent; that much of this work was thrown into the winter months by delays caused by yardage overrun, and performance of the contract thereby delayed.

Paragraph XI (R. 15) avers that plaintiff was prepared to and would have completed the contract well within the time limit specified, but the increases in amount and change in character of work interfered with plaintiff's plan of operation.

Paragraph XX (R. 20) avers that because of the facts alleged earlier in the complaint "defendant per-

mitted plaintiff without objection to extend the time of completion of said railroad to January 1, 1928, at which time plaintiff had fully completed said railroad and the same was accepted by the defendant."

The reply further avers in Paragraph V (R. 149) that plaintiff would have completed the road on time but for the increase in amount and change in character of the work by defendant.

We note that the averment of paragraph XX, *supra,* is not that defendant permitted some part of the work to continue, but is that defendant permitted plaintiff to "extend the time of completion of said railroad." The contract was to build a railroad. We think the averment of extension of time is sufficient.

It developed in proof not only that the averments of change and increase of work and consequent delay were true, but also that in taking from plaintiff portions of the uncompleted road to get the log haul defendant in writing directed plaintiff to continue the contract on the remainder of the road, one of the notices bearing date October 7, 1925, *after the completion date fixed by the contract* (R. 306).

No move was made by defendant to test the sufficiency of these averments of extension of time, nor to limit the reach of the averments in paragraph XX. Under these circumstances the complaint will be liberally construed and all intendments invoked in its behalf.

> *Clarkson v. Wong* (1935), 150 Or. 406, 410; 42 P. (2d) 763, 765.

The contract to build the Orofino-Headquarters railroad is not separable. A part thereof was the right and duty of the contractor to conduct all commercial

hauling until the completed road was accepted by the operating department of defendant (R. 123). We believe it well established that delay caused by defendant does extend time of performance, and permitting a contractor to continue after the stipulated time is an extension of the time of completion.

Marks v. Northern Pacific R. Co. (1896), 76 Fed. 941, 945 (9th CCA).
King Iron Bridge & Mfg. Co. v. St. Louis (1890), 43 Fed. 768, 769 (C.C.Mo.).
Coal & Iron Ry. Co. v. Reherd (1913), 204 Fed. 859, 880 (4th CCA).
A. R. Young Const. Co. v. Road Improvement Dist. No. 2 (1924), 297 Fed. 127, 138 (8th CCA).
Wortman v. Montana Cent. Ry. Co. (1899), 22 Mont. 266; 56 Pac. 316, 324-325.

The written notice without time limit given July 8, 1927, to continue work under the contract, followed by a like notice October 7, 1927, *after the stipulated finishing date,* were formal extensions of time.

The Amoskeag Manufacturing Co. v. United States (1873), 17 Wall. 592; 21 L. ed. 715, 716.

Where the sufficiency of a pleading is challenged for the first time after trial, the court will look at the entire record, including the evidence, in passing on the challenged pleading. Certainly plaintiff attempted to plead an extension of time to perform the contract. Thereafter the case was tried on the theory that the time was extended either to Octobr 25, 1927, when defendant took the entire road, or until December 31, 1927, when the road was delivered to defendant's operating department. Evidence of the log haul was compiled by defendant at request of plaintiff. It was so compiled for two periods, July 16, 1927, to October 25,

1927, and July 16, 1927, to December 31, 1927. So trying the case will aid the pleading, if it needs aider, which we deny.

Rorvik v. North Pacific Lbr. Co. (1921), 99 Or. 58, 71-72; 190 Pac. 331, 334-335.
State ex rel Carson v. Kozer (1922), 105 Or. 509, 520; 210 Pac. 172, 175.
Boyle v. Coast Improvement Co. (1915), 27 Cal. App. 714; 151 Pac. 25, 27.
Lamb v. Ulrich (1923), 94 Okla. 240; 221 Pac. 741, 743.
Sherwood v. City of Sioux Falls (1898), 10 S. Dak. 405; 73 N.W. 913, 914.

Even though the complaint should be held defective as a pleading of extension of time, and the court should decline to give weight to trial of the case without challenging the pleading, yet the complaint pleads waiver by defendant of the time limit for completion. It sets up the facts that constitute waiver, and that is all that is necessary.

Jaloff v. United Auto Indemnity Exchange (1927), 121 Or. 187, 195; 253 Pac. 883, 886.
Watson v. Pacific Mutual Life Ins. Co. (1933), 144 Or. 413, 415; 21 P. (2d) 201, 202.

We submit that plaintiff's pleadings do present the issue of extension of time, and that it was error to rule otherwise.

We believe the findings are sufficient to permit this court to enter judgment for the increased amount that should be awarded for the log haul, at least up to the time the entire road was taken from plaintiff October 25, 1927. We think plaintiff was entitled to conduct the log haul until the road was turned over to the operating department of the defendant as provided by the contract. However, the finding of the court (Finding XV, R. 164) is that the plaintiff had the right to conduct the log haul while the line was under construc-

tion; that on October 7, 1927, in making another piecemeal taking of a portion of the road, there was a direction from defendant to plaintiff to continue on the contract (R. 166), and that the entire road was taken October 25, 1927 (R. 167); that no portion of the road had been completed when taken; that plaintiff was progressing satisfactorily with its contract and the road was taken for the purpose of gaining the log haul for defendant and depriving plaintiff thereof. The court further finds (Finding XVII, R. 169) the amount of damage sustained by plaintiff because of this taking, if plaintiff's pleadings are sufficient to present the issue, to-wit, the contract price for the amount of logs hauled to October 25, 1927, $304,301.08, and the fair cost of conducting this transportation by plaintiff would have been $72,209.95, leaving a net sum due plaintiff on this item, up to October 25, 1927, of $232,091.13, for which judgment should have been passed instead of $125,000, as found by the court.

In view of the specific direction to continue work after the stipulated finishing date, which direction the court finds was given by defendant to plaintiff, we think all findings are made that are necessary to enable this court to enter the judgment that should be entered, and that on this department of the case this court is fully authorized and empowered to direct the judgment that should be entered without sending it back for re-trial.

Massachuetts Bonding & Ins. Co. v. Santee (1933), 62 F. (2d) 724 (9th CCA).

Howbert v. Penrose (1930), 38 F. (2d) 577 (10th CCA).

City of Fort Scott v. Hickman (1884), 112 U.S. 150; 28 L. ed. 636, 641.

United States v. Stark (1929), 32 F. (2d) 453 (6th CCA).

To avoid repeating argument, and because it seems to be the more logical method of presenting the next two assignments, we argue Assignment of Error No. IV in advance of argument on Assignment of Error No. III.

ASSIGNMENT OF ERROR No. IV (R. 384)

This specification assigns error in refusing to allow interest from the date specified in the contract when all moneys should be due and payable to the contractor, the interest being claimed with respect of underpayments for hauling bridge materials, for which work a specific price is named in the contract. Defendant wrongfully construed the contract as calling for a price less than specified. No question of the amount of such hauling is involved. Plaintiff contends (1) that this cause of action is a simple claim for money not paid when due by the contract, and (2) if construed as an action for breach of contract it nevertheless would be for breach of contract to pay money on a specified date; that on either construction interest should be awarded from the due date under both the state statute and the federal rule. The contract fixes unit prices for all work, among them being:

Hauling piles furnished by the company, per lineal foot mile.....$ .02
Hauling timber furnished by the company, per thousand feet b.m. mile..... .85
Hauling metal fastenings, per tone mile..... .65

The court properly found that plaintiff hauled piles furnished by the company, for which, at the stipulated rate, $5,353.78 should have been paid, of which only $660.49 had been paid; timber furnished by the company, for which, at the stipulated rate, $47,253.99 should have been paid, of which only $20,410.52 had

been paid; and metal fastenings, for which, at the stipulated rate, $2,563.31 should have been paid, of which only $1,313.62 had been paid; and gave judgment accordingly, but refused to allow interest prior to judgment. The contract provides that when it shall have been performed the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance." The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor." Defendant through its construction department took the entire road from plaintiff October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927. Timely and appropriate requests were made for interest on the award.

ARGUMENT

Assignments III and IV both deal with the action of the court in declining to allow interest upon the recovery which was awarded on the cause of action for the contract price which would have accrued to plaintiff for hauling logs (commercial haul) and for refusing to pay plaintiff the contract price for hauling bridge materials (material haul). We will discuss the material haul first.

The court rested its denial of interest on the sole proposition that interest may not be allowed if the action is for "breach of contract." Apparently no distinction was made between breach of contract to pay money definite in amount and with a definite due date, and breach where the amount is not ascertained or

ascertainable. We submit that it is unsafe to rely upon such generalities in determining whether interest recovery should be awarded.

The complaint in one statement pleads four causes of action, (1) for money due for work different than contemplated by the parties, (2) for money due for the log (commercial) haul, the exact amount of which was known to defendant, but of which defendant had wrongfully deprived plaintiff, (3) for money due for hauling bridge materials at the price specified in the contract, defendant having wrongfully paid at a lower price, and (4) for a balance due on book accounting.

The joinder of these several causes of action in one statement was not attacked by defendant. This waives the objection.

State v. Montag Co. (1930), 132 Or. 587, 593; 286 Pac. 995, 997.
1 Bancroft's Code Pleading, Sec. 116, p. 224.
Phillips on Code Pleading, Sec. 287, p. 270.

The statement of several causes of action together will not permit one to dominate the others or to classify the several causes, but each will be treated as though separately stated.

Metcalf Co. v. Gilbert (1911), 19 Wyo. 331; 116 Pac. 1017, 1021.
Smith v. Jones (1902), 16 S. Dak. 337; 92 N.W. 1084, 1085.
Beers v. Kuehn (1893), 84 Wis. 33; 54 N.W. 109.

Metcalf Co. v. Gilbert (1911), 19 Wyo. 331; 116 Pac. 1017 (bottom first column, p. 1021):

"The form of the petition not having been properly challenged, it is to be construed the same as though there were separate statements of two causes of action, one upon an express contract for the agreed price, and one upon implied contract for the reasonable value of the services rendered."

Treating the two haul claims separately, it readily appears that the claim for underpayment for hauling bridge materials (R. 21; Complaint pars. XXII-XXVII) is a simple complaint for money past due,—breach of contract to pay money at a fixed time and in a certain amount. The amount of material hauled by plaintiff under the contract was not in issue,—was always known to defendant. The rate of pay was definitely fixed in the contract (R. 59). Defendant refused to pay the contract rate. Under the contract, payments should have been made monthly (R. 67), but in any event within thirty days after the road was completed (R. 71). With that record, that promise to pay at a definite time, is plaintiff entitled to interest on the amount due from the due date? Can plaintiff be deprived of this, without which it will not have been compensated, upon any such general proposition as that interest will not be allowed if the action is for breach of contract?

Oregon Code Annotated 1930, Section 57-1201, provides (setting forth the Oregon Statute as amended in 1917):

> "The rate of interest in this state shall be six per centum per annum and no more, and shall be payable in the following cases, to-wit:
>
> "1. On all moneys after the same becomes due; provided, that open accounts shall bear interest from the date of the last item thereof."

* * *

Prior to the amendment of this section in 1917, decisions of the Oregon court were not uniform. In *Sargent v. American Bank and Trust Co.* (1916), 80 Or. 16; 154 Pac. 759; 156 Pac. 431, the presence of a semicolon was held to prohibit interest on moneys due until the claim was in judgment.

In 1917 this section was amended to provide for interest on moneys after the same became due. Thereafter interest has been awarded on recoveries from the time money became due before judgment, and earlier decisions were expressly thrown into the discard.

City of Portland v. State Bank of Portland (1923), 107 Or. 267, 278; 214 Pac. 813, 816.

As amended, the Oregon statute has received the same construction this court gives to a similar act of Congress governing interest in Alaska. In

New York Alaska Gold Dredging Co. v. Walbridge (1930), 38 F. (2d) 199, 204 (9th CCA)

this court allowed interest in a case involving a claim for money due under a service contract as to the terms and interpretation of which the parties were in disagreement. The issue was about the same as in the case at bar.

Such has been the ruling of the Oregon Supreme Court in cases since the amendment of 1917.

Watson v. Pacific Mutual Life Ins. Co. (1933), 144 Or. 413, 420; 21 P. (2d) 201, 202.

Defendant refused to pay full disability benefits provided in an insurance policy, presenting an issue of fact as to the extent of disability. Until this issue was determined, the amount was uncertain. It was a breach of contract to pay money. Interest was allowed on the recovery when the amount that should have been paid had been ascertained. (144 Or. middle p. 420.)

"As to the allowance of interest upon the unpaid benefits from the date they were due, section 57-1201, Oregon Code, 1930, provides that interest shall be payable on all moneys after the same becomes

due. The finding of the jury determined that the installments were due and hence interest accrued thereupon."

Hill v. Wilson (1928), 123 Or. 193; 261 Pac. 422.

The facts in this case are stated in 108 Or. 621; 216 Pac. 751. Hill performed personal services for Wilson as a loan broker. The amount of commissions was for computation. Applying the amended Oregon interest statute, the court said:

(123 Or. bottom p. 199).

"The pay for said services was due when the services were rendered. Money bears interest in this state from the time it is due."

Even where the amount is in controversy, if the contract requires payment at a stated time, interest will be allowed from due date on the sum the court or jury finds should have been paid.

North Pacific Const. Co. v. Wallowa County (1926), 119 Or. 565, 572; 249 Pac. 1100, 1102-1103.

This case involved a road construction contract which contained the usual provision making final estimate and decision of the chief engineer binding and conclusive. The final estimate was assailed by the contractor. The contract required the amount earned to be paid within 35 days after final estimate. The court found the contractor had been underpaid upwards of $20,000, that the proper amount should have been paid on the due date, and awarded interest. (119 Or. top p. 572.)

"As we have determined the proper amount to have been awarded to the plaintiff at that time was $21,718.52; it became the duty of the defendant to

pay that amount to the plaintiff within thirty-five days thereafter, or on August 10, 1921. Under the provisions of Section 7988, Oregon Laws, interest at the rate of 6 per centum per annum 'shall be payable in the following cases, to-wit:

"'1. On all moneys after the same became due; provided, that open accounts shall bear interest from the date of the last item thereof.'

"The plaintiff is entitled to interest on the balance found due as stated from that date."

Clearly, under the decisions of the Oregon Supreme Court rendered since the amendment of 1917, and under the decisions of this court construing a similar interest statute for Alaska, the right of recovery of interest is not governed by the form of action. If the money fell due before suit just compensation requires that interest be awarded for use of the money from the due date. The right to interest is not defeated by a denial of the claim even if made in good faith.

Gellert v. Bank of California (1923), 107 Or. 162, 178; 214 Pac. 377, 383.

This was an action to recover money represented by drafts purchased from the bank with intent to make a gift thereof to certain persons in New York. The purchaser died without having made the gift. Her executor sued the issuing bank for the amount represented by the drafts. The Oregon court held (107 Or. 175-176) that the bank could offset against recovery the expense it had been to in transmitting the funds to its New York correspondent and obtaining return thereof, thus ruling that an offset will not prevent allowance of interest on the net amount due because interest was allowed on the amount found to be due from

demand. The court further rejected the claim that a good faith defense will defeat the interest award. (107 Or. middle p. 178).

> "The contention is that when the right to recover money is in good faith denied, interest will not be allowed on the demand prior to liquidation by judgment. The following precedents are relied upon to support this contention: *Baker County v. Huntington*, 48 Or. 593, 603 (87 Pac. 1036; 89 Pac. 144); *Holtz v. Olds*, 84 Or. 567, 581 (164 Pac. 583); *City of Seaside v. Oregon S. & C. Co.*, 87 Or. 624, 634 (171 Pac. 396). Each of the precedents relied upon by the appellant was based upon the statute as it existed prior to the enactment of Chapter 358, Laws of 1917, amending Section 6028, L.O.L. The amount for which the plaintiff sued was a definite and certain sum. The plaintiff was entitled to recover either the whole amount of each draft or nothing. The amount became due before judgment. By the plain terms of Section 7988, Or. L., as it now reads after amendment, interest 'shall be payable * * * on all moneys after the same become due.' Interest was properly included in the judgment."

In its most recent decision on the subject the Oregon court allows interest on a judgment for conversion and on an accounting, overruling earlier decisions on that subject.

> *Abrams v. Rushlight* (July 7, 1937), Or. Adv. Sheets, Vol. 24, No. 22.

Under the law of the forum, interest should have been allowed on the award under this item of the complaint. It was not a matter of discretion. Substantial justice required the allowance.

> *Miller v. Robertson* (1924), 266 U.S. 243; 69 L. ed. 265, 272.

Chanslor-Canfield Midway Oil Co. v. United States (1920), 266 Fed. 145, 151 (9th CCA).
Montana Mining Co. v. St. Louis Min. & Mill. Co. (1910), 183 Fed. 51, 70 (9th CCA).

Prior to the amendment of the Oregon statute in 1917 there were a number of decisions ruling that interest could not be allowed in actions for breach of contract; there were decisions ruling that interest could not be allowed on a claim for conversion; and there were decisions ruling that interest could not be allowed if there was a good faith denial of the claim. We think, however, under the Oregon cases decided since the statutory amendment of 1917 interest should be allowed on claims for breach of contract such as here presented, where the contract fixes a specific price and due date. If there be doubt as to this contention, if the position of the Oregon Supreme Court may be said to be in a state of flux or uncertainty, the federal court will follow its own rule, which allows interest where required to do substantial justice.

Concordia Ins. Co. v. School District (1931), 282 U.S. 545; 75 L. ed. 528, 543.

If we eliminate cases in which there is no definite amount fixed in the contract, ascertained or ascertainable, and no definite due date, we think there can be no question but that the Oregon court has construed its amended statute to conform to the general rule that interest should be allowed in cases where the amount is ascertainable by computation and the due date is fixed.

ASSIGNMENT OF ERROR No. III (R. 383)

This specification assigns error in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul

during construction. Plaintiff contends that where a construction contract requires defendant to submit a final estimate on completion and pay the full balance due within thirty days thereafter, this fixes the date from which interest will accrue on money wrongfully withheld; that a wrongful taking of commercial haul from the contractor under misconstruction of the contract can not relieve defendant of the duty to rightly construe and pay under the contract; that where the amount of this commercial haul is known to defendant and the total is merely a matter of computation, the full amount thereof is due at the time named in the contract and interest will accrue thereon from the due date under both the state statute and the federal rule, whether treated as interest or damages for delay, subject to the right in defendant to have the principal amount reduced as of the due date by the amount it would have cost plaintiff to conduct the log haul. The contract provides that when it shall have been performed, the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance." The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor." Defendant, through its construction department, took the entire road from plaintiff on October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927. Plaintiff made timely and appropriate request that interest be allowed on the award for the log haul dating from February 1, 1928. This was refused, and the court refused to allow interest on the award prior to judgment.

ARGUMENT

Plaintiff was entitled to conduct the log haul as a part of the commercial business included in its contract (R. 168; Finding XV). With advices in the invitation to bid that the road was to be in shape to move logs for a period of three months before the completion date of the contract, and that the Clearwater Timber Company would have logs to move, this item would form an important consideration to a contractor preparing his bid. It did in this case, and a price of $1.00 per car mile was stipulated. After plaintiff had hauled the first carloads of these logs defendant wrongfully took from plaintiff the portion of the road upon which rail had been laid in order that defendant might conduct the log haul, and deprived plaintiff of the profits thereof. The amount of commercial business thus wrongfully conducted by defendant was known and not questioned at trial. The rate of pay therefor was definite. The amount due monthly depended only on computation. Under the contract all was due in any event February 1, 1928. Had plaintiff been permitted to conduct this haul the cost thereof would have been a part of the current expense under the contract. Can the right of defendant to have this cost deducted from the agreed rate of compensation defeat plaintiff's right to interest from due date on the aggregate compensation it lost? We think such an offset or counter-claim merely reduces the amount but does not change the right.

We will not again cite cases heretofore cited (this brief, p. 28-33) to the point that interest accrues on money due whatever the form of action. We think the claim for profits on the commercial haul was a liquidated claim within the rule respecting interest. The two tests are stated to be (1) is the exact amount as-

certained or *ascertainable* by computation? and (2) can the time from which interest is to run be ascertained? (*1 Sedgwick on Damages* (9th ed.), Sec. 300, p. 571.)

As to (1) the amount of compensation is definitely fixed in the contract and defendant had in its possession a record of the definite quantities of logs hauled. As to (2) the contract definitely fixes the time when payment should have been made.

1 Sedgwick on Damages (9th ed.), Sec. 314a, p. 622.

> "Where by the contract it was the defendant's duty at a certain time to liquidate the debt, and he fails to do so, interest can without doubt be recovered on the balance found due from that time."

1 Sedgwick on Damages (9th ed.), Sec. 314b, p. 624.

> "If one claim is liquidated in amount, interest will run on that claim though the counter-claim is unliquidated."

At Section 308a, page 597, the same author says that for work and labor at an agreed price payable at a fixed time, interest will be added. Sedgwick in his text is but announcing the general rule on the subject.

8 R.C.L., p. 534.
17 C.J. 817.
Miller v. Robertson (1924), 266 U.S. 243; 69 L. ed. 265, 272.
Van Rensselaer v. Jewett (1849), 2 N.Y. 135.

Van Rensselaer v. Jewett (1849), 2 N.Y. 135.

This is a leading case. It holds that in an action for breach of contract interest will be allowed from due date if the amount can be ascertained by computation even though values of goods that fluctuate in value must be determined by a jury. It involved a

contract to pay rental in commodities and services. Interest was allowed. After reviewing earlier cases, the court said:

(2 N.Y. p. 140).

"The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money."

8 R.C.L. p. 534:

"For the reason that claims founded on breach of contract are more readily ascertainable in their amount, or capable of being liquidated by computation, than are those arising out of torts, the rule is that interest as damages is generally allowed in actions for breach of contract, provided, of course, the claim has other essential elements of certainty,

as, for example, that it is payable on a certain day and there is a default in payment or performance, or that the liability is fixed by a demand."

Allowance of interest as damages for breach of contract in order to award full compensation, was recognized as proper in Oregon at an early date.

Livesley v. Johnston (1906), 48 Or. 40, 54; 84 Pac. 1044, 1049.

Too much emphasis in some of the early decisions has been placed on the term "liqudated." More recent decisions of courts generally approach the rule of the federal courts to allow interest when substantial justice requires it.

Faber v. City of New York (1918), 222 N.Y. 255; 118 N.E 609, 610:

(118 N.E. bottom second column p. 610.)

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values, or other generally recognized standards?"

As noted in this brief (p. 31-32) the Oregon Court in *Gellert v. Bank of California* ruled that the fact that defendant may have an offset or counter-claim of ex-

pense incurred will not prevent the allowance of interest on the net amount that should have been paid. This is the general rule.

33 C.J. 210.
New York Alaska Gold Dredging Co. v. Walbridge (1935), 76 F. (2d) 655, 657, 659 (9th CCA).

It is stated in the *American Law Institute Restatement of the Law of Contracts,* as follows:

"Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled." *Sec. 337.*

Under this section the author of the Restatement gives many illustrations applicable to the situation in the case at bar, particularly note (h).

Failure to pay based on misconstruction of contract will carry interest.

Hind v. Uchida Trading Co. (1922), 55 Cal. App. 260; 203 Pac. 1028, 1029 (rehearing denied by Sup. Ct.).

Defendant had the opportunity to save interest by tender, saving to plaintiff the right to sue for any amount in excess of the tender. Instead of doing this, the defendant denied all liability and retained use of the money. Defendant can not complain in good conscience if it is required to pay the rent.

Prager v. New Jersey Fidelity & Plate Glass Ins. Co. (1927), 245 N.Y. 1; 156 N.E. 76, 77.

(156 N.E. bottom second column p. 77.)

"The defendant could have limited its liability for interest by a common-law tender, or by a payment on account without prejudice to the plaintiff's right to recover the excess. If it chose to keep the money, it should pay for what it kept. * * * More and more the courts are coming over to the view that, in actions on implied contracts to recover for services or property, interest is a concomitant very nearly automatic, and this though the value has been honestly disputed. Interest is now held to be an incident to 'just compensation,' where property has been taken in the exercise of the power of the government."

Even under statutes providing for summary judgment in claims on "liquidated demands" interest will be allowed on the contract price where the contractor is not permitted to perform or where reasonable value is to be ascertained.

Weisberg v. Art Work Shop (1929), 235 N.Y.S. 8; 226 App. Div. 532 (affirmed 252 N.Y. 572; 170 N.E. 147).

Grossman v. Brick (1927), 5 N.J. Misc. Rep. 1016; 139 Atl. 490.

Henry W. Cooke Co. v. Sheldon (1933), 53 R.I. 101; 164 Atl. 327.

The amount of the claim for this commercial haul was known to defendant at all times. The contract provided a specific compensation per car mile. The record of car miles and amount of commercial freight was kept by the defendant. From its records, the evidence on this subject was obtained. The total claim was merely a matter of computation. The final and ulti-

mate due date is fixed in the contract as 30 days after the work is completed. The work was completed and the road delivered to the operating department of the defendant December 31, 1927. While this money should have been included in the monthly estimates and probably would have been included and payments made monthly if plaintiff had not been deprived of the haul, the latest date at which full compensation was due was February 1, 1928. Had plaintiff been permitted to perform its contract in this respect, the cost would have been met by plaintiff as the contract was performed, and the only figure that would concern the defendant would have been the contract rate for hauling. Defendant alone created the situation that exists. It can not, through its own wrong, keep the use of money due plaintiff and refuse interest thereon. Its only right is to have the amount due reduced by the determined cost of the haul. Having denied the claim intoto, and retained use of the money, defendant should pay the rent.

CONCLUSION

Plaintiff cross-appellant submits that the court erred:

(1) In limiting evidence of preliminary negotiations so as to exclude such evidence as representations of the amount and character of the work upon which plaintiff bid.

(2) In ruling that plaintiff's pleadings do not tender an issue as to the right to recover for the log haul beyond September 1, 1927 (in respect of this item plaintiff submits that the court's findings are such as to permit this court to enter a proper judgment).

(3) In denying interest on the award for the material haul from the final due date fixed in the con-

tract, and that this court should award interest on the aggregate sums making up the material haul claim ($32,786.45) at the rate of six per cent per annum from February 1, 1928.

(4) In denying interest on the commercial haul claim; that the award on this cause of action should be increased to at least $232,091.13, and interest should be awarded on this amount from February 1, 1928.

Respectfully submitted,

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APPENDIX

ASSIGNMENT OF ERROR No. I

This specification assigns error in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where the contract specifies a price per unit, or yard, of work, for a proposed railroad through the mountains, and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material and constitutes a representation upon which bidders must rely as to difficulties and size of job, and in determining whether bidder can undertake it. The only profile or description of work was that accompanying the invitation to bid. In the year 1925 Northern Pacific Railway Company undertook the construction of a branch line of railroad into the timber of the Clearwater Timber Company, the road to extend from Orofino on the main line of the railroad company to Headquarters, a distance of 41 miles, through a rough, rugged mountain range.

Defendant let bids on a survey up the canyon of Orofino Creek made for the timber company by one Chamberlin, admittedly a competent locating engineer. On September 18, 1925, an invitation to bid was mailed by defendant in St. Paul, Minnesota, to plaintiff at Seattle, Washington, accompanied by profiles of the Chamberlin survey, showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. The profile contained all of the information of a final location, showing grade, curvature, and amount and classes of

material to be moved; also with the invitation went a detailed description of the line shown on the profiles. Blank forms for filling in the bidder's price for all work on a unit basis accompanied the invitation, which advised bidders that there was a time limit for the work as the road was required to be ready to move logs for the Clearwater Timber Company by June 1, 1927. Plaintiff's bid was accepted and construction of the railroad was begun a month before the formal contract was signed. The contract, which was drawn by defendant, names the termini but does not designate the route of the proposed line, and is on a unit basis.

Plaintiff, in determining whether to bid, and in preparing and submitting its bid, relied upon the Chamberlin profile and data submitted by defendant. Defendant in computing the totals of the several bids for comparison used the amounts of the several classes of material shown on the Chamberlin profile, and furnished plaintiff a large number of blue prints of said profile for use in letting subcontracts and dividing the work between subcontractors. The chief engineer of defendant approved the subcontracts. The field engineer had only the Chamberlin profile when he arrived at the work, began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile.

As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards were moved.

When plaintiff offered the letter of invitation to bid above mentioned, defendant offered the following objection thereto:

> "The defendant objects to the admission of the proposed document. It appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is immaterial and not competent in support of any issue in this case."

When plaintiff offered the Chamberlin profile above mentioned, defendant offered the same objection which it had offered to the letter of invitation above mentioned.

When plaintiff offered the description of the proposed railroad line furnished by defendant to bidders, defendant objected thereto for the same reason stated in objecting to the above mentioned letter of invitation to bid, and the additional reason that:

> "It is an attempt to vary the terms of the written contract thereafter made."

In putting in its own case in defense, defendant called as a witness its chief engineer, who testified without objection that the defendant took bids on the Chamberlin profile, that defendant sent out the invitation to bid which had been offered in evidence by plaintiff, and thereafter, and before bids were submitted, defendant sent to plaintiff supplemental letters and information modifying some of the information which accompanied the invitation letter.

The court qualifiedly sustained the objections to plaintiff's offers of the letter of invitation, the Chamberlin profile and the description of the proposed line;

that is, the offers were rejected as representations of the line or grade of the railroad, or the amount or character of the work to be performed under the contract; the court limited said evidence to establishing the general course of the projected road to be through the canyon of Orofino Creek and rejected it for all other purposes.

Exception to the rejection and limitation of said evidence was taken as follows:

> "Plaintiff excepts to the rejection of the evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor."

Appropriate and timely requests were made by plaintiff for special findings with respect of these original representations.

ASSIGNMENT OF ERROR No. II

This specification assigns error in construing plaintiff's pleadings as not presenting the issue of extension of time to complete the construction contract beyond the finishing date named therein (September 1, 1927), and therefore limiting plaintiff's recovery for wrongful deprivation of log haul to logs hauled prior to that date. Plaintiff contends that its complaint avers all facts necessary to plead (1) a waiver of the time limit, and (2) affirmatively pleads an extension of time for completion (Complaint, pars. VI, VII-VIII, IX, XI, XX; reply par. V).

In September, 1925, defendant mailed to plaintiff and other contractors an invitation to bid on construction of a branch line of railroad from Orofino to Headquarters in the state of Idaho. The road was to tra-

verse a rough mountain range. With the invitation went a profile of final location of the line up the canyon of Orofino Creek, a detailed description of the line, and blank forms to be filled in with prices for each unit of work. The information thus submitted showed 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. It warned against cutting into the points of land at stream curvature to avoid bridge construction, as that would produce immense yardage in the steep canyon sides. Plaintiff based its bid on this information; defendant used this information in computing the several bids; the field engineer, and plaintiff, whose bid was accepted, began work on the profile submitted with the invitation.

The invitation to bid required rail to be laid by June 1, 1927, to move logs for the Clearwater Timber Company; the contract fixed the same date, with September 1, 1927, the date for completing the finishing work on the road. The contract was signed by plaintiff November 18, 1925.

As required by the contract, the subcontracts were submitted to and approved by defendant's chief engineer, and the entire work was divided between various subcontractors. The subcontracts provided for completion of grading at various dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line at Headquarters.

The canyon of Orofino Creek is very rough, and the first 15 miles out of Orofino was important because it would be the means of transporting materials to the canyon. The data accompanying the invitation to bid indicated that 352,425 cubic yards of material would have to be moved in this first sector; final estimate

was 635,842 cubic yards. Early in the work the engineer knew the yardage would overrun materially, but did not give definite advice thereof to plaintiff. Instead, the increase was permitted to develop gradually. By June 30, 1926, 355,000 cubic yards of material had been moved on the first sector. The work then continued on this part of the road until the year end, delaying other work.

Many changes were made by the engineer from that indicated on the profile on which bids were based. A tunnel was changed to open cut; 22 new and additional changes in the creek channel were made; 21 bridges eliminated and embankment substituted therefor; work was shifted from one side of the creek to the other; heavy rock work was required where team work was indicated; and a wide grade surface was developed in places by shifting the center line, at one point the width exceeding 100 feet. At some of the steep canyon banks a shift of line as much as one foot could increase the yardage one thousand per cent. Some of the shifts cut into the canyon bank as much as 55 feet. Whereas the profile submitted with the invitation to bid indicated a job of moving 1,078,000 cubic yards of material, the plaintiff was required to move 2,057,575 cubic yards.

Plaintiff had a feasible plan to complete, and would have completed, the work on time, which was submitted to and approved by defendant before work began. It was based on the work indicated on the profile submitted with the invitation to bid, and contemplated that all grading would be completed by October 1, 1926, most of it during the summer of 1926. By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material. Much of the balance of the total yardage had to be moved in the winter of 1926-1927 under very

difficult weather conditions. New channel changes of difficult nature contributed largely to the delay. Some of them were on the first 15 miles, and with the large increase in yardage on that sector delayed the entire work. At request of defendant, plaintiff began work immediately on acceptance of its bid October 15, 1925, and had been pursuing the work on the profile submitted with the invitation for a month before the formal contract was presented and signed.

Defendant directed construction of a number of bridges from rail end. This could not be done until the lower end of the road was completed. Under direction of defendant mud blocks were set in the bed of Orofino Creek during the summer of 1926; thereafter the work of erecting bents was necessarily performed in the winter of 1926-1927 under conditions of almost indescribable difficulty.

Plaintiff's performance of the contract was delayed in the beginning by failure of the defendant to have trackage facilities at Orofino, and to have camps for its resident engineers. All were constructed by plaintiff; also defendant had not acquired rights of way, and plaintiff had to shift work from place to place during early construction.

In July, 1927, defendant ordered work to stop on the lower portion of the road (which defendant took over and completed, wrongfully, we think) but directed plaintiff to "proceed with the completion of the contract work north of Jaype siding." A like notice to stop work on an additional sector above Jaype was given October 7, 1927, and again plaintiff was directed to continue the contract work on the remainder of the line. The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department of the defendant. The Clearwater Timber Company had

cut and banked along the right of way upwards of 20,000,000 f.b.m. of logs prior to July, 1927, which had to be moved before another winter to avoid heavy damage. At the contract price of $1.00 per car mile for moving these logs, they were an important commercial haul item, and plaintiff prepared to haul them and did haul some of them before July 16, 1927. On that date defendant took that portion of the road on which rails were laid, extending from Orofino to Jaype (but on which finishing work was not completed) in order to get this traffic and deprive plaintiff of the profits thereof. With the same motive, additional portions of the road were taken October 12, 1927, and the entire road was taken October 25, 1927. The portions of the road thus taken piecemeal were operated and the logs handled by the construction department of defendant. No portion of the road was turned over to the operating department of defendant until December 31, 1927.

Appropriate and timely requests were made by plaintiff for special findings that performance of the contract was delayed by defendant and the time for completion extended accordingly. These requests were refused. The court properly found plaintiff was entitled to conduct the log haul, that the taking by defendant was wrongful, and that plaintiff was entitled to recover the profits of which it was thereby deprived, but the court further found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927, denying recovery for the period between September 1, 1927, and October 25, 1927, and for the period between October 25, 1927, and December 31, 1927.